cl

IN THE

SUPREME COURT OF THE UNITED STATES

1978 TERM

NO. 78-5420

THEODORE PAYTON,

Appellant,

v.

NEW YORK,

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

Mot dismiss or affirm

MOTION TO TREAT IN PART AS A PETITION FOR A WRIT OF CERTIORARI AND DENY REVIEW, AND TO DEFER CONSIDERATION OF THE REMAINING QUESTION

ROBERT M. MORGENTHAU
District Attorney
Attorney for Appellee
155 Leonard Street
New York, New York 10013
(212) 553-9000
(PETER L. ZIMROTH, ROBERT M. PITLER and HENRY J. STEINGLASS,
Assistant District Attorneys
Of Counsel)

10

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

1978 TERM

NO. 78-5420

THEODORE PAYTON,

Appellant,

v.

NEW YORK,

ON APPEAL FROM THE NEW YORK
COURT OF APPEALS

MOTION TO TREAT IN PART AS A PETITION FOR A WRIT OF CERTIORARI AND DENY REVIEW, AND TO DEFER CONSIDERATION OF THE REMAINING QUESTION

Preliminary Statement

On this appeal from a decision of the New York Court of Appeals, appellant challenges the constitutionality of statutory provisions authorizing police officers to enter a dwelling without a warrant in order to effect an arrest for a felony based upon probable cause. (Jurisdictional Statement, p.2, Question 1). Appellant also presents additional questions concerning the "inevitable discovery" exception to the exclusionary rule. (id., Questions 2 and 3).

1. The "inevitable discovery" issue is not within this Court's jurisdiction as an appeal, and certiorari review should be denied. It is unlikely that the questions appellant raises concerning the principle of "inevitable discovery" would be reached in this case. Rather, if review were granted, the focal issue would be whether the facts of this case come within the principle of "attenuation" recently enunciated in United States v. Ceccolini, 435 U.S. 268 (1978)--that a "live witness" who voluntarily supplies evidence may dissipate the taint which would otherwise result from some antecedent illegal act.

2. With respect to the first question presented, this is one of three appeals in which it is contended that New York statutory provisions which permit entry to arrest without a warrant are unconstitutional as applied to cases where there are no exigent circumstances. Riddick v. New York (Dkt. No. 78-5421). Gonzalez v. New York (Dkt. No. 78-5422). The Riddick case squarely presents that constitutional issue. This case does not, for two reasons. First, the record here is incomplete on the issue of exigent circumstances and does not portray a concrete factual situation in which to evaluate the constitutionality of the statute as applied to this case. Second, there is serious doubt whether, if a rule requiring arrest warrants were to be adopted now, the remedy of the exclusionary rule should by applicable to this case. The entry here took place pursuant to a statute at a time when there was no serious question about the constitutionality of the rule, implicitly approved in prior decisions of this Court, that a warrant is not

required for a daytime entry to arrest for a felony based upon probable cause.

Accordingly, appellee moves pursuant to Rule 16(d) to defer consideration of this appeal pending determination of the appeal filed in the Riddick case. Depending on the decision in that case, remand to the state courts may be appropriate for consideration of the additional issues involved in this case.

STATEMENT OF THE CASE

Introduction

On Monday morning, January 12, 1970, Theodore Payton, armed with a rifle, walked into a gas station in Manhattan and forced the manager, Roberto Carassas, to hand over approximately a thousand dollars of the weekend receipts. When Payton also demanded the money in the office safe, Carassas resisted and in the ensuing struggle was fatally wounded by one of the two .30 caliber bullets fired from Payton's rifle. Payton fled with the rifle and the thousand dollars.

Two witnesses at the scene of the crime knew Payton and recognized him despite the mask he was wearing. Melvin Gittens had known Payton since childhood. Gittens observed Payton as he walked past Gittens on the way into the gas station office. Gittens also saw Payton inside the office, where he heard Payton speak to the manager and to Gittens himself. Raymond Williams also had considerable opportunity to observe Payton and to hear Payton speaking to him.

Later on the day of the killing, Payton admitted to a friend, Jesse Leggett, that he had committed the

crime. When Leggett saw Payton again the next day, Payton, who was carrying a rifle in a gun case, said he was going to get rid of the rifle. Leggett recalled that Payton had said he had purchased a .30-30 Winchester rifle in upstate New York in November 1969, and that Payton had taken the rifle hunting with Leggett in December 1969, a month before the murder.

Sidney Roseman, the owner of a sporting goods store in Peekskill, New York, had sold a .30-30 Winchester rifle, some .30-30 shells and other equipment to a man who identified himself as Theodore Payton. The sale, made on November 19, 1969, was recorded on a form known as a "Firearm Transaction Record," which Roseman filled out and kept on file as required by federal regulations. Handwriting analysis showed that the signature on the form, written in Roseman's presence, was appellant's.

Although the murder weapon was never recovered, ballistics analysis showed that a .30 caliber shell casing which Payton had in his apartment on January 15, 1970, had been fired from the same rifle as two .30 caliber shell casings recovered at the scene of the crime.

The foregoing evidence was presented at Payton's

trial in June 1974.* The defense presented no witnesses. Payton was found guilty of felony murder. The jury was unable to reach a verdict on intentional murder. Payton was sentenced on October 29, 1974, to a term of fifteen years' to life imprisonment, which he is presently serving.

The conviction was affirmed by the Appellate Division, First Department, without opinion, 55 A.D. 2d 859 (December 16, 1976), and by the New York Court of Appeals in an opinion reported at 45 N.Y. 2d 300 (June 15, 1978).

---

*In describing the evidence at trial, appellant is mistaken in asserting that Gittens initially told the police that he could not recognize the perpetrator. (Jurisdictional Statement, p. 4). In fact, on the day the crime was committed, Gittens told both his sister and his attorney that he had recognized the holdup man. (Gittens: T. 378, 403; J. Yarrell: T. 413-414; Stein: T. 460-465). The attorney, who was representing Gittens on a homicide charge unrelated to this incident, said that he, rather than Gittens, should handle disclosure of that information, and the attorney proceeded to contact the District Attorney's Office. Accordingly, when Gittens was interviewed by Detective Malfer on January 12, Gittens described the man in detail, but did not give the man's name. (Gittens: T. 292-293, 304, 367-376, 378, 386, 387; Stein: T.460-467).

As with Gittens, appellant is mistaken in stating that Williams initially told the police that he could not recognize the perpetrator. (Jurisdictional Statement, p. 4). Williams described the man but did not at first give the man's name, fearing that if he became involved his criminal record would become known to his employer and he would be fired (William: T.500-501, 532-533, 538-542, 545-546, 552-553).

Implying that Gittens somehow lacked credibility because he cooperated with the District Attorney's Office on this matter, appellant states that Gittens received a five-year sentence on the unrelated homicide charge he was facing. (Jurisdictional Statement, p. 4, 2d footnote). Appellant fails to note that Gittens sentence was imposed over the objection of the District Attorney's Office, which sought a more severe sentence (Gittens: T.294-295, 337-349; Stein: T.455-456, 467-70).

["(T.___)" indicates pages of the trial minutes, which are contained in volumes 1 and 2 of the original record].

On appeal in the state courts and in this Court, Payton has sought to suppress, first, the shell casing he had in his apartment and, second, evidence concerning his purchase of a Winchester rifle shortly before the murder. The .30 caliber shell casing was observed in plain view when police officers entered his apartment in order to arrest him for the murder. Appellant contends that this evidence should have been suppressed on the ground that the officers did not enter his apartment lawfully. New York follows the long standing and widely accepted rule, developed at common law, that a police officer may enter a dwelling to arrest for a felony based upon probable cause.* Appellant contends that that this statute should be declared unconstitutional as applied to his case, and that the mandatory warrant procedure which governs searches in the absence of exigent circumstances should be extended to entries into a dwelling to effect an arrest.

Appellant also seeks to suppress the evidence provided by Sidney Roseman, the owner of the Peekskill gun store, concerning Payton's purchase of a .30-30 Winchester rifle in November 1969. According to Payton, Roseman's identity was the tainted "fruit" of a bill of sale illegally seized from Payton's apartment. The People have conceded that the bill of sale was not observed in plain view and was therefore seized illegally. The People have maintained, however, that Roseman's evidence was admissible under either of two exceptions to the exclusionary

---

*The text of the statute in effect at the time of this entry (Code of Criminal Procedure, Sections 177 and 178) is set forth in the Jurisdictional Statement at pp. 2-3.

e: the principle of "attenuation" as it applies to evidence provided by live witnesses, and the principle of "inevitable discovery."

The Record Concerning the Entry into Payton's Apartment and the Observation of the Shell Casing in Plain View

At the pretrial hearing held on appellant's motion to suppress evidence found in his apartment, appellant's contention was that the officers entered his apartment in order to search it, and that a search warrant was required. The People maintained that the officers entered the apartment to arrest Payton as authorized by statute. Hence, although other evidence not found in plain view had to be suppressed, seizure of the shell casing which was observed in plain view was proper.

Thus, the hearing focused on the purpose of the officers in entering the apartment and on whether the shell casing was observed in plain view. The constitutionality of the statute permitting the police to enter the apartment without a warrant in order to effect an arrest was not raised by Payton until after the hearing. Accordingly, the record does not contain a clear picture of whether exigent circumstances would have excused the police from obtaining an arrest warrant, assuming one was constitutionally required.

The record shows that at a meeting held on January 14, 1970, two days after the murder, Gittens, accompanied by his attorney, informed authorities that he had recognized the masked killer whom he had known since childhood. Also on January 14, Leggett--taken into custody in the Bronx on unrelated charges--volunteered

that he had information concerning this crime. Detective Malfer went to talk to Leggett, who pointed out to the detective the building in the Bronx where Payton lived. (Malfer: SH.122-123, 139, 161-164; A20-21, 37, 59-62)*. Detective Malfer did not go up to Payton's apartment at that time (Leggett: T.788), but continued his investigation, interviewing Leggett further at the detective's office in Manhattan and at one point showing him a series of photographs (Leggett: T. 817).

The record does not show at what time Payton's address was pointed out to Detective Malfer, why the detective did not attempt to arrest Payton at that time, what further investigation the detective subsequently conducted, when the decision was made to go to Payton's apartment, or whether the officers' trip to Payton's apartment the following morning, January 15, was precipitated by any particular event, e.g., the receipt of information indicating that Payton was in the apartment at that time.

In any event, at approximately 7:30 a.m. on January 15, Detective Malfer, accompanied by his sergeant and three other detectives (SH. 123-234, 142-143; A21-22, 40-41), went to Payton's apartment. A light was visible beneath the bottom of the apartment door and a radio was heard playing music inside (SH. 125, 144; A23, 42). When one of the officers knocked, there was no

*"(SH.___)" indicates pages of the pre-trial suppression hearing minutes, which are contained in volume 1 of the original record. Where pages of the original record were reproduced in Appellant's Appendix filed in the New York Court of Appeals, parallel page references to the Appendix (indicated as "A__") are provided following the references to the original record, e.g. "(SH. 107-111; A5-9)."

response (SH. 126-127, 144; A24-25, 42). The metal door was locked, and the detectives called for assistance in opening it. (SH. 127, 146; A25, 44). Half an hour later, at approximately 8:00 a.m., Emergency Services personnel arrived and forced the door open, using crowbars (SH. 149-150; A 47-48).*

Detective Malfer and other officers then entered the apartment and checked the rooms, looking for Payton in order to arrest him for the murder (SH. 127, 128, 151-152; A25, 26, 49-50). In the living room, Detective Malfer saw in plain view on top of a stereo set a .30 caliber shell casing (SH. 129, 134, 158-160; A27, 32, 56-58). Knowing that Roberto Carassas had been killed with a .30 caliber bullet (SH. 165-166; A63-64), the detective took the shell casing (SH. 135; A33) for examination by ballistics experts. Payton was not found in the apartment.

The officers then conducted a full-scale search of the apartment, examining the contents of drawers, cupboards and closets (SH. 153-154, 155; A51-52, 53). They found a shotgun and a bandolier with buckshots for the shotgun (SH. 129, 155-156; A27, 53-54), several photographs, and a bill of sale for various items, including a Winchester rifle (SH. 135-136; A33-34). The objects found during this search were removed from the apartment (SH. 160, 164-165; A58, 62-63), but prior to the hearing the District Attorney's Office,as noted, conceded that this evidence was seized illegally and accordingly it was ordered suppressed.

---

*Appellant is mistaken in stating that an hour passed before Emergency Services personnel arrived (Jurisdictional Statment, p. 3). At trial, Detective Malfer testified that Emergency Services officers arrived approximately half an hour after they were called (T.901).

The hearing judge found that Detective Malfer was testifying truthfully that the officers entered the apartment to arrest Payton and that the shell casing was observed in plain view (see SH. 114, 146-47; A12,44-45). The judge ruled that the entry was authorized by the arrest statute and that seizure of the shell casing was proper. (Decision of Birns, J., June 4, 1974, 84 M. 2d 973; Appellant's Appendix C). The judge made no findings on the issue of whether there were exigent circumstances which would excuse obtaining an arrest warrant if one was required. That issue was not litigated at the hearing.

The Court of Appeals ruled that the entry into Payton's apartment to arrest him was lawful although no warrant was obtained. The court was required to consider the constitutionality of the arrest statute since this case was argued together with People v. Riddick (in which an appeal to this Court has also been taken). In the Riddick case, it was clear that there were no exigent circumstances. Nine months before the police entered Riddick's apartment to arrest him, the victims of two robberies had been shown a photograph of Riddick and identified him as the perpetrator; two months before the arrest, the investigating detective had learned Riddick's address from his parole officer. The majority of the court ruled that entry to arrest for a felony based upon probable cause was permissible without a warrant though no exigent circumstances were present. Having decided that issue, the majority did not resolve the question of whether there were exigent circumstances in this case.

One judge, who dissented on other grounds, concluded that arrest warrants are generally required and accordingly found the entry in the Riddick case to be unlawful. However, he concluded that exigent circumstances were present in this case (Opinion of Wachtler, J., Appellant's Appendix A, p. 11). Two judges concluded that arrest warrants are required and that exigent circumstances were not present in this case or in Riddick. (Opinions of Fuchsberg and Cooke, J.J., dissenting, Appellant's Appendix A, pp. 14, 15-21).

The Hearing Concerning the Admissibility of Sidney Roseman's Evidence

During the trial, the defense objected that the evidence provided by Sidney Roseman, which concerned Payton's purchase of a .30-30 Winchester rifle in Peekskill before the murder, was the tainted "fruit" of the bill of sale which had been found in Payton's apartment and which had been ordered suppressed prior to trial. The People did not dispute that Detective Malfer had learned of the Peekskill gun store from the bill of sale.* However, Roseman testified at trial that on numerous occasions he had received inquiries from state and local police, and insurance companies, concerning gun sales, and that in response "we pull out the firearms record" which federal regulations required that he keep on file.** (Roseman: T. 954-55; A139-140). A post-trial hearing

*The bill of sale named the store, not Roseman, as appellant suggests in his Jurisdictional Statement at p. 17, n.6.

** The instructions on the printed "Firearm Transaction Record" form state:

> "Upon completion of the firearm transaction, the transferor [defined under Definitions, No. 1, as the "person selling or otherwise disposing of the firearm"] must make a part of his permanent records the original Form 4473 [Firearms Transaction Record] recording that transaction and any supporting documents. (Peo. Exh. 5 at

was ordered to supplement the trial record with respect to the People's contention that Roseman's evidence would have "inevitably" been discovered.

At the post-trial hearing, Detective Malfer described the normal investigative procedure he would have followed if he had not had the bill of sale found in Payton's apartment. Ballistics evidence from the scene of the crime showed that the deceased had been killed by a .30-30 Winchester bullet, and eyewitnesses described the murder weapon as a pump action, lever-type rifle. Since the rifle was not recovered, it was of primary importance in the investigation to attempt to establish whether Payton had owned or possessed such a weapon (Malfer: T.849; PTH.* 15-16, 17, 19-20, 22; A155-156, 157, 159-160, 162).

Independent of the bill of sale, Detective Malfer knew from Payton's friend, Leggett, that Payton had purchased a .30-30 Winchester rifle in upstate New York in November 1969 (Malfer: PTH. 17, 23 (A157,163); Leggett: T.670-71, T.740-741; PTH. 8-11 (A148-151)). Accordingly, the detective would have contacted the Bureau of Alcohol, Tobacco and Firearms in the United States Department of the Treasury in an effort to trace the purchase of a rifle by Payton in upstate New York. (PTH: Malfer: 17-18, 22-24) (A157-158, 162-164)).

The federal agency maintained a list of the approximately eleven hundred licensed gun dealers in the State of New York, including the New York City and Long Island area which was eliminated by Leggett's information. There was a separate list for the Westchester-

*"(PTH__)" indicates pages of the minutes of the post-trial hearing, which was held on October 15, 1974.

Putnam County area (PTH: Brady: 29-31, 34-35 (A169-171, 174-175); Pec. Exh. 3), which was just north (or "upstate" in Leggett's words) from where Payton lived.*

Using the lists available from the federal agency, Detective Malfer would have proceeded to communicate with the gun dealers concerning purchase of a rifle by Payton. (PTH: Malfer: 20; A160). This was a normal investigative procedure in the circumstances of this case where the murder weapon had not been recovered (PTH: Malfer: 17, 20 (A157, 160)). Since Payton had used his own name in purchasing the rifle, it would have been simply a matter of time before the detective's inquiries

---

*In addition, Leggett had been with Payton when he had bought another gun at "Tony's" in Ossining, New York which is in Westchester County. (Leggett: PTH. 9-10; A149-150). While the hearing judge stated that it is not clear whether Detective Malfer actually had this information prior to trial (A189; Appellant's Appendix D, p.1), the information was clearly available to the detective from Leggett in January 1970 (see Malfer: PTH. 15, A155; Leggett: PTH. 9-10, A149-150). Inquiry to local police in Ossining concerning gun shops in the vicinity would have revealed to the detective that the closest store to "Tony's" was Roseman's store in Peekskill on Route 9, a fifteen minute drive away (Malfer: PTH. 27 (A167); Brady: PTH. 31-34 (A171-174)).

reached Roseman, whose practice it was to respond to such communications from law enforcement agencies.*

The hearing judge concluded that "the district attorney has proven by a preponderance of the evidence that the unlawful seizure of the bill of sale was not a sine qua non of the discovery of the Peekskill gunshop dealer." Rather, police contact with the Peekskill gun shop dealer was "inevitable". (Minutes of October 29, 1974, p.9, A194; Appellant's Appendix D p. 3).

---

*Detective Malfer had previously made similar types of inquiries to locate pieces of evidence (PTH: Malfer: 21; A161). Payton makes much of Malfer's answer on cross-examination that he had never contacted "every" gun dealer in New York State or heard of an inquiry in which contact had been made with "every" gun dealer in the state (PTH: Malfer: 25; A165). Jurisdictional Statement, pp.7, 14. However, as the majority of the Court of Appeals noted (Opinion, Appendix A, p. 10, n.5), that answer is not inconsistent with the detective's testimony on direct that conducting the inquiry in this case would have been normal investigative procedure. It would rarely be necessary to contact every gun dealer in the state since available information would usually suggest a smaller geographical area in which to concentrate the inquiry. Thus, here, Leggett's information limited the inquiry to the "upstate area". And Payton's residence in the Bronx (and also the information available from Leggett concerning Payton's purchase of a firearm at "Tony's") made the Westchester-Putnam County area a likely place to begin the inquiry.

In the Court of Appeals, Payton did not challenge the validity of the principle of "inevitable discovery" but argued that a higher than "preponderance" standard should be used in applying that principle. The People's first response was that, regardless of its admissibility under the "inevitable discovery doctrine, Roseman's evidence was admissible under the principle of "attenuation" as it applies to live witnesses, which this Court had recently approved in United States v. Ceccolini, 435 U.S. 268 (1978). The Court of Appeals noted this ground but did not rule on it. (see majority opinion, Appellant's Appendix A, p.10, n.6). Instead, the court held that the evidence was sufficient to support application of the "inevitable discovery" doctrine.

In considering the sufficiency of the evidence, all but one of the judges apparently agreed with the People's position that the issue was not the standard of proof used by the trial judge, but whether the evidence was sufficiently persuasive under the strict standard imposed by the "inevitable discovery" doctrine itself. The majority held that the doctrine requires not literal "inevitability" but rather a "very high degree of probability". They concluded that the evidence in this case, which was uncontradicted, met that standard. (Opinion, Appellant's Appendix A, pp.9-10). Two of the dissenting judges disagreed, concluding that the evidence was insufficient to meet the higher standard of "certainty" which they believed the doctrine required. (Opinions of the Wachtler and Cooke, J J., Appellant's Appendix, pp. 12-14, 20). The third dissenter believed that a "reasonable doubt" standard was appropriate. (Opinion of Fuchsberg, J., Appellant's Appendix A, p. 14-15).

MOTION TO TREAT APPELLANT'S PAPERS IN PART AS A PETITION FOR A WRIT OF CERTIORARI AND TO DENY REVIEW

The questions appellant poses concerning the principle of "inevitable discovery" (Jurisdictional Statement, p.2, Questions 2 and 3) do not involve the constitutionality of a statute and therefore are not within this Court's jurisdiction as an appeal. 28 U.S.C. Sec. 1257 (2). Certiorari review of these matters should be denied.

The New York Court of Appeals considered Mr. Roseman's testimony and the Firearms Transaction Record he provided to be admissible because that evidence would have been "inevitably discovered" even if the police had not unlawfully seized a sales slip from Payton's apartment. This Court has not decided whether evidence which has been obtained as a result of an antecedent illegal act is nonetheless admissible if that evidence would have been obtained lawfully in any event. Compare Brewer v. Williams, 430 U.S. 387, 406-407 at n. 12 (1977), with Fitzpatrick v. New York, 414 U.S. 1050 (1973) (White, J., dissenting from a denial of certiorari). Even if the issue of the validity of the "inevitable discovery" doctrine is properly presented here despite appellant's failure to challenge the doctrine in the Court of Appeals, it is unlikely that this Court would ever reach that issue in this case. Regardless of the correctness of the decision by the Court of Appeals, Roseman's evidence would be admissible under this Court's recent ruling in United States v. Ceccolini, 435 U.S. 268 (1978).

In the Ceccolini case, the evidence given by a witness was discovered solely as a result of an illegal search. It was accepted by this Court that the evidence would not, as in this case, have been discovered "inevitably." (435 U.S. at 273). Nonetheless, the Court held that under the principle of "attenuation", the evidence provided by the "live witness" would not be deemed a "fruit" of the illegal search.

In view of the decision in the Ceccolini case, the admissibility of Roseman's evidence would turn, not on the applicability and validity of the "inevitable discovery" doctrine, but rather on the applicability of the principle of "attenuation." There is no reason for this Court, so soon after Ceccolini, to hear another case in which the parties debate the application of that principle to another set of facts. This case presents merely such a factual dispute. Indeed, there is every reason to apply the "attenuation" principle here.

Thus, Roseman's testimony at appellant's trial in 1974 was freely given, and was not coerced or induced by the bill of sale found in Payton's apartment four years earlier. Roeman willingly cooperated with the police in accordance with his practice of providing information about gun sales upon request from various agencies. There is no showing that the bill of sale was used in interviewing Roseman; nor is there any indication that the police searched Payton's apartment for the purpose of finding a knowledgeable witness against him.*

---

*Thus, this case does not present the question, left open in Ceccolini, whether the exclusionary rule should apply when an illegal search is conducted for "the specific purpose of discovering potential witnesses." 435 U.S. at 276, n. 4.

Furthermore, Roseman's "individual human personality" made him capable of receiving a communication directed by police to gun dealers on the federal agency's list, and he was willing to look through his files and respond. Thus, Roseman was a vital force intervening between the illegality and the evidence he provided.

Moreover, as a witness, Roseman could, and did, give a living account of the sale, which he had personally made. This account went beyond the "cold record" of the Firearm Transaction Record in several important respects. For example, Roseman testified that, because of the amount of the sale, he "threw in" a "soft black [gun] case" which did not have a handle and had to be carried under the arm (Roseman: T. 596-597).* Roseman also testified that he had seen the purchaser sign the Firearm Transaction Record (Roseman: T. 597).** And Roseman was questioned at length concerning

---

*Several eyewitnesses testified that the holdup man carried under his arm a black leather case, from which he took the rifle used in the killing. And Leggett testified that Payton was carrying such a case the day after the killing.

**A hand-writing expert--another live witness--testified that appellant had signed this document.

the Poughkeepsie residence claimed by Payton when he purchased the rifle. Thus, as the trial judge stated, Roseman was a "key witness" and provided testimony that was "very damaging" to the defense. (PTH. 6-7; A146-147).

Payton disputes whether the "attenuation" principle should be applied to Roseman's evidence. He points to what he claims are factual distinctions between this case and Ceccolini. For example, he notes that Roseman provided a document (the Firearms Transaction Record) as well as testimony, and he argues that Ceccolini is distinguishable on the ground that "the Firearms Transaction Record was used to examine Roseman at trial whereas the policy slips in Ceccolini were not used to question Hennessey." (Jurisdictional Statement, p. 15, n.5).

However, since the policy slips in Ceccolini were found during an illegal search, it would have been significant in applying the principle of "attenuation" if they had been used to question the witness in that case. In contrast, in this case, the Firearms Transaction Record which Roseman was asked about at trial was not itself illegally seized, but was provided by Roseman and thus was further removed from the "primary illegality" than Roseman himself. Accordingly, the questioning of Roseman about that document does not significantly alter the application of the "attenuation" principle to the facts of this case. And, while appellant (Jurisdictional Statement, p. 15, n.5) disagrees with our analysis of the extent to which Roseman's testimony would have been damaging to the defense without the Firearms Transaction Record, that dispute would concern at most merely another circumstance in the "attenuation" analysis.

In sum, if certiorari review were granted, the focal issue would not be the questions appellant poses concerning the principle of "inevitable discovery", but rather the principle of "attenuation" as it applies to situations involving live witnesses.* Review of another case involving that principle, so recently addressed in Ceccolini, is not warranted.

---

* We note that appellant is mistaken in asserting that there is conflict between the New York Court of Appeals and the Second Circuit with respect to the principle of "inevitable discovery." In Ceccolini itself, the Second Circuit approved not only that principle, but also the "preponderance" standard use by the trial court. The Second Circuit quoted with approval the District Court's statement that the government had the "burden of proving by a fair preponderance of the credible evidence that it would have inevitably come across her [the witness] in the course of its investigation." 542 F. 2d 136, 141 (2d Cir. 1976), rev'd on other grounds, 435 U.S. 268 (1978). See also United States v. Falley, 489 F. 2d 33, 40 (2d Cir. 1973), where the court applied the "inevitable discovery" principle, stating that "it would have been only a question of time before the government by so-called saturation investigation, or otherwise, would have discovered the broker and the importation documents."

MOTION TO DEFER CONSIDERATION OF THE REMAINING QUESTION UNTIL THE APPEAL IN RIDDICK v. NEW YORK IS DECIDED

This is one of three appeals to this Court challenging the constitutionality of New York statutes authorizing police officers to enter a dwelling without a warrant in order to effect an arrest based upon probable cause. Riddick v. New York (Dkt. No. 78-5421). Gonzalez v. New York (Dkt. No. 78-5422). In each of these cases, it is contended that the statutory provisions are unconstitutional as applied to cases in which there are no exigent circumstances excusing the failure to obtain a warrant. The Riddick case squarely presents that issue. This case does not. Accordingly, we respectfully request that consideration of this case be deferred pending determination of the appeal in Riddick.

There is no semblance of exigent circumstances in the Riddick case. Before the police entered Riddick's apartment to arrest him, the better part of a year had passed since Riddick had been identified by his victims. Two months had elapsed since Riddick's address had been furnished to the detective by Riddick's parole officer.

In contrast, this case does not present the constitutional issue squarely and would be better left until the main issue is settled, as it must be in Riddick. There are two reasons why this is so.

First, this record does not portray a concrete factual situation in which to evaluate the constitutionality of the statute as applied. The issue of exigent circumstances was not litigated at the pretrial suppression hearing.* The record does not show the course of the investigation from the "afternoon" when Detective Malfer learned where appellant lived, until the following morning when the detectives went up to his apartment. Accordingly, in this case the claim that the statute is unconstitutional as applied is at best an abstract proposi-

* See above, p. 7. In the Court of Appeals, the People argued that appellant had not preserved for review his claim that exigent circumstances were required to justify entry without a warrant for the purpose of arrest. The People met their burden of going forward at the hearing by proving that the entry was proper under the arrest statute, the constitutionality of which is presumed. While counsel then representing appellant made a remark which could be interpreted as a cryptic reference to the issue of exigent circumstances, the record indicates that neither the judge nor the prosecutor were aware during the hearing that appellant was seeking to suppress the shell casing on the theory that exigent circumstances had to be shown to justify the entry into the apartment. Thus, the judge ruled that questioning concerning events prior to the entry was merely preliminary, and the People's objection to defense questioning about the course of the investigation was sustained.

Accordingly, we contended that since appellant had failure to alert the People to the need to introduce evidence beyond that required to establish the lawfulness of the entry under the statute, appellant was precluded from urging lack of proof on such an issue as a ground for reversal on appeal. Since the Court of Appeals did not accept our waiver argument and reached the question of the statutes's constitutionality, we have not renewed that argument on this motion. However, the fact remains that the record is devoid of concrete facts on the issue of exigent circumstances.

Appellant's allusions to the constitutional issue may have been sufficient to avoid a waiver, so that the issue is now open to him. But, the People relied on the statute and there was no clear indication that appellant was challenging its constitutionality or putting exigent circumstances in issue. Accordingly, the People should not be precluded from requesting a hearing on the issue of exigent circumstances if a decision by this Court, unlike the decision of the Court of Appeals, were to make a determination of that issue necessary.

tion. Indeed, the record suggests, as far as it goes, that in appellant's case the application of the statute would be constitutional regardless of the general proposition he advances.

Here, the police were investigating a murder, committed only two days before, when they received information that appellant had committed the crime. They pursued the investigation. The next morning, when they went to appellant's apartment, it appeared that he was hiding inside. At that point, "a clear showing of probable cause existed," and there was "strong reason to believe that the suspect was in the premises being entered and that he would escape if not swiftly apprehended."* They then entered the apartment in order to arrest him for the murder.

In these circumstances, Judge Wachtler--one of the three judges of the Court of Appeals who accepted the general proposition advanced by appellant and voted to reverse in Riddick because there was no exigency there--concluded that application of the statute to appellant's case was constitutional. In view of the "continuous and intensive investigation" of the murder, Judge Wachtler considered it reasonable for the police to "continue their pursuit into the apartment in order to take a dangerous killer into custody." (Opinion, Appellant's Appendix A, p. 11).

---

*These findings, which were based on the pretrial suppression hearing, were made not in connection with an "exigent circumstances" exception to an arrest warrant requirement, but were made in connection with a different requirement--the duty imposed on an officer by the arrest statute (Code of Criminal Procedure, Section 178) to give notice of purpose and authority be given before a forcible entry. (Decision of Birns, J., June 4, 1974. Appellant's Appendix C (p. 2).

Thus, the presence of exigent circumstances is suggested by the circumstances of this case, but is not readily resolved because the facts in the record are so sparse. In contrast to both this case and Riddick, the record in the third appeal (Gonzalez v. New York) does present an issue concerning the scope of an "exigent circumstances" exception if a rule requiring arrest warrants were to be adopted. In the Gonzalez case, the police entered Gonzalez' apartment to arrest him on drug charges after a police weapon was fired in the course of arresting an accomplice outside the apartment. Gonzalez' theory is that the police could have obtained a warrant a few hours earlier when probable cause to arrest Gonzalez developed during negotiations by an undercover officer for purchase of the drugs. The State replies that there was no duty to obtain a warrant when probable first arose, particularly since at that time there was only probable cause to arrest Gonzalez for a sale of a smaller quantity of drugs that that being negotiated.

In sum, the main constitutional issue must be settled in the Riddick case, in which it is clear that there were no exigent circumstances. Depending on that decision, this appeal may then either be dismissed for want of a substantial question, or consideration may be given to remanding this case to the state courts so they may pass upon the factual and legal questions concerning the issue of exigent circumstances before this Court is asked to do so.

Second, in this case consideration of the main constitutional question is complicated by serious doubt whether a rule requiring a warrant, if adopted now, should be applicable to the entry of police officers into appellant's apartment in January 1970. Here, detectives were engaged in prompt and continous investigation when they entered appellant's apartment during the daytime to arrest him for murder. They acted in accordance with a century-old statute which codified the common law rule that officers may enter a dwelling without a warrant to affect an arrest for a felony based upon probable cause. At the time, there was no serious question about the constitutionality of their conduct. In fact, entry without a warrant during the daytime had been implicitly approved by this Court. See, e.g., Ker v. California, 374 U.S. 23 (1963); Johnson v. United States, 333 U.S. 10, 15 (1948); cf. Jones v. United States, 357 U.S. 493, 499-500 (1958) (questioning forcible nightime entry without a warrant).

In these circumstances, it is questionable whether the purposes of the exclusionary rule would be served by applying a decision requiring arrest warrants to the entry in this case. If arrest warrants were to be required, such a requirement might well constitute a sufficient departure from prior law so that, like the decision limiting searches incident to arrest, it should not apply retroactively. See Williams v. United States, 401 U.S. 646 (1971). See also People v. Ramey, 16 Cal.3d 263, 276 n.7, 127 Cal. Rptr. 629, 545 P. 2d 1333, 1341, n.7, cert. denied, 429 U.S. 929 (1976) (decision requiring arrest warrants would not be applied retroactively).

The considerations militating against retroactive application of any decision to require arrest warrants are much more serious in this case than in the other two appeals now before this Court. In the Riddick case, the police conduct took place in 1974. In Gonzalez, the conduct took place in 1972. By then, questions had been raised concerning the constitutionality of making an arrest in a dwelling without a warrant in the absence of exigent circumstances. See Coolidge v. New Hampshire, 403 U.S. 443 (1971).

Here, since the entry took place in 1970, before there was any serious question about the constitutionality of the statute authorizing it, suppression of evidence resulting from that entry would not seem to be appropriate unless Payton were the successful party to a decision requiring arrest warrants. As noted, however,

the substantive decision should be made in Riddick because that case rather than this one squarely presents the substantive issue. While Payton's appeal is here at the same time as the appeals taken by Riddick and Gonzalez, this Court may select the case in which it will decide whether to enunciate a new constitutional principle, even though the consequence of such a choice is that parties to other pending cases would not then receive the benefit of a decision adopting the new principle. Thus, in Johnson v. New Jersey, 384 U.S. 719 (1966), this Court declined to apply the principles of Miranda v. Arizona, 384 U.S. 436 (1966), to Johnson even though his case not only was pending at the same time as Miranda but had been argued with the four cases decided under the title of Miranda.*

In sum, the main constitutional question should be settled in the Riddick case, which presents the issue in a straightforward and clearcut way. In this case, the issue is not squarely presented because the record does not show clearly whether or not there were exigent circumstances. There is also serious doubt whether, since the entry here took place in 1970, a rule requiring arrest warrants should apply to this case. Accordingly, consideration of this case should be deferred until

*While the Johnson case involved certiorari review of a denial of collateral attack in state court, nevertheless, the retroactivity principles enuciated in Johnson did not turn on whether a case was on direct appeal as distinguished from collateral review.

the Riddick case is decided. If the decision in Riddick requires that the additional issues involved in this case be reached, then it would be appropriate to consider remanding this case to the New York Court of Appeals so that court may consider those issues before this Court is asked to do so.

CONCLUSION

Review should be denied of questions 2 and 3 (Jurisdictional Statement, p.2), which are within this Court's certiorari jurisdiction. Consideration of the remaining question should be deferred pending this Court's determination of the appeal in Riddick v. New York, DKT. NO. 78-5421.

Respectfully submitted,

Robert M. Morgenthau
District Attorney
New York County.

By: Robert M. Pitler
Robert M. Pitler,
Assistant District Attorney

Attorney for Appellee
155 Leonard Street
New York, New York 10013
(212) 553-9000

Peter L. Zimroth
Chief Asssistant District Attorney
Henry J. Steinglass
Assistant District Attorney
Of Counsel

November 22, 1978